

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY REGION III  
AND  
MARYLAND DEPARTMENT OF THE ENVIRONMENT

IN THE MATTER OF:	)	
	)	
ALLIED-SIGNAL FACILITY	)	
BALTIMORE, MD	)	Docket No.: RCRA-03-2003-0088TH
	)	
	)	AGREEMENT AND COVENANT
	)	NOT TO SUE SBER HARBOR POINT,
	)	LLC AND HARBOR POINT
	)	DEVELOPMENT, LLC
UNDER THE AUTHORITY OF THE	)	
COMPREHENSIVE ENVIRONMENTAL	)	SETTLING RESPONDENTS
RESPONSE, COMPENSATION, AND	)	
LIABILITY ACT OF 1980, 42 U.S.C.	)	
§§ 9601-9675, AS AMENDED	)	
AND THE SOLID WASTE DISPOSAL ACT,	)	
42 U.S.C. §§ 6901, <u>et seq.</u> , AS AMENDED.	)	
AND TITLE 7, SUBTITLE 2,	)	
ENVIRONMENT ARTICLE, ANNOTATED	)	
CODE OF MARYLAND	)	

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## **I. INTRODUCTION**

1. This Agreement and Covenant Not to Sue (“Agreement”) is made and entered into by and between the United States on behalf of the Environmental Protection Agency (“EPA”), the State of Maryland (the “State”) on behalf of the Maryland Department of the Environmental (“MDE”), SBER Harbor Point, LLC and Harbor Point Development, LLC (collectively, the “Parties”).
2. This Agreement is entered into pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. §§ 9601 - 9675, and the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (“RCRA”), 42 U.S.C. §§ 6901-6992k, and the authority of the Attorney General of the United States to compromise and settle claims of the United States.
3. The State enters into this Agreement pursuant to Title 7, Subtitle 2 of the Environment Article of the Annotated Code of Maryland.
4. SBER Harbor Point, LLC is a limited liability corporation with its headquarters located at 1040 Hull Street, Baltimore, Maryland 21230. Harbor Point Development, LLC is a limited liability corporation with its headquarters located at 1000 Lancaster Street, Suite 420, Baltimore, Maryland. SBER Harbor Point, LLC and Harbor Point Development, LLC (collectively “Settling Respondents”) have proposed a joint project to redevelop a certain 27-acre parcel of property formerly owned and operated by Allied-Signal (the “Property”). Allied-Signal merged with Honeywell, Inc. in 2000. Honeywell is the

current owner of the Property. The Property is located along the Patapsco River near the Inner Harbor within the City of Baltimore as depicted in the map attached as Exhibit 1.

Settling Respondents are proposing to enter into a 99-year ground lease with Honeywell for the Property.

5. The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations and limitations contained in Section VII (Certification), Section XI (United States' Covenant Not to Sue), Section XII (Reservation of Rights), and Section XIII (The Settling Respondents' Covenant Not to Sue), the potential liability of Settling Respondents for the Existing Contamination at the Property which might otherwise result from Settling Respondents entering into a long-term ground lease.
6. The Parties agree that Settling Respondents' entry into this Agreement, and the actions undertaken by Settling Respondents in accordance with the Agreement, do not constitute an admission of any liability by Settling Respondents.
7. The resolution of this potential liability, in exchange for provision by Settling Respondents to EPA and MDE of a substantial benefit, is in the public interest.

## **II. DEFINITIONS**

8. Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CERCLA and/or RCRA or in regulations promulgated under CERCLA and/or RCRA shall have the meaning assigned to them in CERCLA and/or RCRA or in such regulations, including any amendments thereto. Whenever terms listed below are used in this

Agreement, the following definitions shall apply:

- a. "Day" shall mean a calendar day unless expressly stated to be a working day.
- b. "Duly Authorized Representative" shall mean a person set forth or designated in accordance with the procedures set forth in 40 C.F.R. § 270.11(b).
- c. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.
- d. "Existing Contamination" shall mean: any solid waste, hazardous waste, hazardous constituent, hazardous substance, pollutant or contaminant present, existing or released on or under the Property as of the effective date of this Agreement.
- e. "MDE" shall mean the Maryland Department of the Environment and any successor departments or agencies of the State.
- f. "Monitoring Program" shall mean the following activities conducted by Allied-Signal and Honeywell as required by the remedy selected by EPA and MDE in the April 16, 1992 Final Decision and Response to Comments ("FDRTC") and amendments thereto referred to in paragraph 13, below: limited monitoring of chromium in the sediment and perpetual monitoring of the inward hydraulic gradient, chromium in the surface water, chromium and cyanide in the groundwater, chromium and cyanide in the cap drainage, general visual problems in the soil, and chromium and asbestos in the air upon any soil disturbance.
- g. "Parties" shall mean the United States on behalf of EPA, the State on behalf of MDE, SBER Harbor Point, LLC and Harbor Point Development, LLC.
- h. "Paragraph" shall mean a portion of this Agreement identified by an arabic numeral.

- i. “Property” shall mean the 27-acre peninsula located in Baltimore, Maryland and depicted generally on the map attached as Exhibit 1 to this Agreement and which is subject to a Consent Decree, Civil Action Number R-89-1804, as amended, attached hereto as Exhibit 2.
- j. “Released” shall mean any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment of any solid waste, hazardous waste, hazardous constituent, hazardous substance, pollutant or contaminant.
- k. “Remedial Components” shall mean the following activities conducted by Allied-Signal as required by the remedy selected by EPA and MDE in the FDRTC and amendments thereto: dismantling all on-site structures; constructing and maintaining an embankment to prevent erosion along the waterside perimeter of the entire Property; installing a deep vertical hydraulic barrier to help contain contaminated groundwater on-site; installing and maintaining a multimedia cap over the entire area enclosed by the hydraulic barrier to preclude contact with Property soils and minimize groundwater recharge; installing and operating a system to withdraw contaminated groundwater from the contained Property so as to maintain a lower water level inside the barrier (the final design included a water transfer station to manage extracted groundwater); installing a layered soil cap over an adjacent property (the “Southeast Quadrant”) to preclude contact and ingestion of Property soils; and evaluating, and installing as necessary, soil caps over newly acquired properties to preclude ingestion of Property soils.
- l. "Section" shall mean a portion of this Agreement identified by a capitalized roman

numeral.

- m. "Settling Respondents" shall mean SBER Harbor Point, LLC and Harbor Point Development, LLC.
- n. "State" shall mean the State of Maryland.
- o. "United States" shall mean the United States of America, its departments, agencies, and instrumentalities.
- p. "Work Plan" shall mean any submission required pursuant to this Agreement which describes or relates to the implementation of any requirement under the Agreement.

### **III. STATEMENT OF FACTS**

- 9. Allied-Signal owned and operated the Property from approximately 1954 until 1985. During its operation and ownership of the Property, Allied-Signal used the Property for chromium processing activities. In 2000, Allied-Signal merged with Honeywell, Inc. Honeywell is the current owner of the Property.
- 10. The Property had been used for chromium ore processing since the early to mid-1800's. Successive owners have expanded the Property to its current size and shape by filling adjacent portions of the Baltimore Harbor with various materials, including refuse material from the processing of refined chromite ore.
- 11. Allied-Signal's chromium processing activities at the Property contributed to chromium contamination in the soil and the groundwater at the Property. In 1986, contractors hired by Allied-Signal calculated that 62 pounds of chromium were being released each day from the Property. Of the 62 pounds of chromium that were released each day, 50 pounds a



day entered the surface water of the Baltimore Harbor. The balance of the released chromium (12 pounds per day) entered the groundwater below the Harbor.

12. In September 1989, EPA, the MDE and Allied-Signal entered into a Consent Decree in the Federal District Court for the District of Maryland (Civil Action Number R-89-1804), pursuant to Sections 3008(h), 7002(a)(1)(B) and 7003 of RCRA (the “Consent Decree”) under which Allied-Signal agreed to conduct investigations of on-site and off-site contamination and to perform EPA’s selected remedy.
13. As a result of investigations conducted by Allied-Signal pursuant to the Consent Decree, on April 16, 1992 EPA and MDE issued a Final Decision and Response to Comments (“FDRTC”) in which the remedy for the Property relating to Existing Contamination was selected. The selected remedy required Allied-Signal to complete the Remedial Components and institute and maintain the Monitoring Program.
14. By letter dated March 21, 2000, Honeywell submitted to EPA and MDE for review and approval a Construction Completion Report (“CCR”) dated February 2000 that addressed the hydraulic barrier, the head maintenance system, the multimedia cap, and the layered soil cap. By letter dated August 26, 2002, Honeywell submitted to EPA and MDE for review and approval a Draft Construction Measures Implementation (“CMI”) Report dated July 2002 that addressed installation of a soil cap over two newly acquired properties. Based upon EPA and MDE’s review of the CCR, Draft CMI Report and other required submittals, EPA and MDE have determined that Honeywell has completed the requirements under the Consent Decree except for resolving administrative issues related to finalizing the Surface Soil Monitoring Plan, the Health and Safety Plan, the Corrective Measures Implementation Report (same as the CMI Report), and the Contingent

Remediation Work Plan.

15. By letter to EPA dated October 3, 2002, Settling Respondents stated their interest in negotiating an agreement with EPA and MDE, pursuant to which they would obtain a covenant not to sue and contribution protection (hereinafter referred to as a request for a Prospective Lessee Agreement (“PLA Request”)) and subsequently enter into a long-term ground lease for the Property.
16. Settling Respondents stated in the PLA Request that they intend to redevelop the Property as a mixed use office-technology-retail complex which will include 11 acres of public open space. Settling Respondents intend to offer commercial space for lease on the Property. Settling Respondents agree to manage any hazardous waste, hazardous constituent, hazardous substance and/or solid waste at the Property during their lease of the Property in accordance with federal and State laws and regulations. In addition, Settling Respondents agree not to lease or sublease any part of the Property to lessees or sublessees who expect to generate any hazardous waste, hazardous constituent, hazardous substance and/or solid waste at the Property other than in accordance with federal and State laws and regulations or to any party who is related to Honeywell.
17. By signing this Agreement, Settling Respondents represent, and for the purposes of this Agreement, EPA and MDE rely on those representations, that Settling Respondents have had no involvement with the Property and have not caused or contributed to “Existing Contamination.”

#### **IV. WORK TO BE PERFORMED**

18. Settling Respondents agree to perform the following activities:

- a. On and after the effective date of this Agreement, Settling Respondents shall comply with the requirements relating to institutional controls as set forth in the Consent Decree, Civil Action Number R-89-1804, as amended, (“Consent Decree”) at Paragraphs 16 (Redevelopment Plans) and 17 (EPA and MDE Approvals) in Exhibit A of the Consent Decree. See Exhibit 2 for a copy of the Consent Decree. Upon approval by EPA and MDE, the Conceptual Development Plan and the Detailed Development Plan (collectively “Development Plans”) required under the Consent Decree, shall be deemed to be incorporated into this Agreement and made an enforceable part hereof, and Settling Respondents shall comply with the Development Plans in accordance with the provisions contained therein.
- b. If at any time following the effective date of this Agreement, Settling Respondents discover any defects, abnormalities or problems with any systems or structures related to the Remedial Components and/or the Monitoring Program, Settling Respondents shall provide EPA’s Project Coordinator, MDE’s Project Coordinator and the designated Honeywell contact, as identified in Paragraph 67 below, with: a) oral notification of such defect, abnormality or problem within twenty-four (24) hours of one of the Settling Respondents’ discovery of such defect, abnormality or problem, and b) written notification of such defect, abnormality or problem within three (3) days of one of the Settling Respondents’ discovery of such defect, abnormality or problem. These reporting requirements are in addition to any reporting requirements set forth at CERCLA § 103, 42 U.S.C. § 9603, and the Emergency Planning and Community Right-To-Know Act (“EPCRA”) § 304, 42

U.S.C. § 11004, and other applicable statute or regulation, including and amendments thereto.

- c. All reports and other documents submitted by Settling Respondents to EPA and MDE which purport to document Settling Respondents' compliance with the terms of this Agreement shall include a certification signed by a Duly Authorized Representative for Settling Respondents.

- i. For purposes of this Agreement, a person is a "duly authorized representative" only if: (1) the authorization is made in writing by a person described in 40 C.F.R. Section 270.11(a); (2) the authorization specifies either an individual or a position having responsibility for overall operation of the regulated facility or activity (a duly authorized representative may thus be either a named individual or any individual occupying a named position); and (3) the written authorization is submitted to the persons designated by EPA and MDE pursuant to this Section XVIII (Project Coordinators).

- ii. The certification required by this Paragraph shall be in the following form:  
“I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant

penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.”

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

- d. Settling Respondents shall provide a copy of this Agreement to each contractor hired to perform any requirement of this Agreement and to each person representing Settling Respondents with respect to the Property, and shall do so within seven (7) calendar days of the effective date of this Agreement or date of such retention, whichever is later. Settling Respondents shall also condition all contracts entered into for performance of the requirements of this Agreement in conformity with the terms of this Agreement. Settling Respondents or their contractors shall provide written notice of the Agreement to all subcontractors hired to perform any requirement of this Agreement. Settling Respondents shall nonetheless be responsible for performing all the requirements herein in accordance with the terms and conditions set forth in this Agreement.
- e. All activities undertaken by Settling Respondents pursuant to Section IV (Work To Be Performed), Section V (Access / Conveyance of Property / Notice to Successors In Interest), Section VI (Due Care/Cooperation), and Section XVI (Document Retention) of this Agreement shall be performed in accordance with the requirements of all applicable federal, state and local laws and regulations.

19. EPA and MDE Review and Approval Of Plans And Other Submissions

- a. EPA and MDE will review each document submitted pursuant to this Agreement (hereinafter collectively referred to as “Submission”) and EPA and MDE shall: (i) approve, in whole or in part, the Submission; (ii) approve the submission conditioned upon certain modifications and/or revisions and require that Settling Respondents modify the Submission and comply with the modified Submission and resubmit the revised Submission (Conditional Approval); (iii) disapprove, in whole or in part, the Submission, directing Settling Respondents to modify and resubmit the Submission; or (iv) any combination of the above. EPA and MDE shall specify in writing any comments, deficiencies, approvals, disapprovals or requests for modifications. No approval, conditional approval or disapproval pursuant to this Paragraph shall be subject to the Dispute Resolution procedures of Section IX (Dispute Resolution). Notwithstanding any notice of disapproval, Settling Respondents shall implement, at the direction of EPA and MDE and within the time periods set forth in any applicable schedule, any task required by any non-deficient portion of a Submission.
- b. Any conditional approval of a Submission made to EPA and MDE pursuant to this Agreement shall be considered a disapproval of such submission unless and until Settling Respondents notify EPA and MDE in writing that any and all conditions for approval have been fully and completely satisfied.
- c. Within thirty (30) days of receipt of EPA and MDE’s comments on any Submission, Settling Respondents shall submit to EPA and MDE for approval a revised Submission which responds to EPA and MDE’s comments and/or corrects any deficiencies identified by EPA and MDE. In the event that EPA and MDE disapprove any portion of a revised Submission, Settling Respondents may invoke the dispute resolution procedures set forth

in Section IX (Dispute Resolution) of this Agreement. However, EPA and MDE reserve the right to prepare such Submission in lieu of Settling Respondents and to seek to recover from Settling Respondents the costs thereof, in accordance with CERCLA, and any other applicable laws, and/or to take any other appropriate action under RCRA, CERCLA, or any other legal authority.

- d. All plans, reports, and other items required to be submitted to EPA and MDE under this Agreement shall, upon approval or modification by EPA and MDE, be enforceable under this Agreement. In the event EPA and MDE approve or modify a portion of a plan, report, or other item required to be submitted to EPA and MDE under this Agreement, the approved or modified portion shall be enforceable under this Agreement. Settling Respondents shall implement any such plan, report, or item as modified or developed by EPA and MDE, subject only to their right to invoke the procedures set forth in Section IX (Dispute Resolution).

**V. ACCESS / CONVEYANCE OF PROPERTY / NOTICE TO SUCCESSORS IN INTEREST**

- 20. Commencing upon the date that they acquire a leasehold interest in the Property, Settling Respondents agree to provide to EPA and MDE, their authorized officers, employees, representatives, and all other persons performing response actions under EPA or MDE oversight, an irrevocable right of access at all reasonable times to the Property and to any other Property to which access is required for 1) inspection and oversight of any development activity that may impact the Remedial Components and/or the Monitoring Program; 2)

inspection and oversight of the Remedial Components; 3) inspection and oversight of the Monitoring Program and 4) performing, monitoring and overseeing response actions at the Property under federal and state law. EPA and MDE agree to provide reasonable notice to Settling Respondents of the timing of response actions to be undertaken at the Property. Notwithstanding any provision of this Agreement, EPA and MDE retain all of their access authorities and rights, including enforcement authorities related thereto, under the Consent Decree, CERCLA, RCRA, and any other applicable statute or regulation, including any amendments thereto.

21. Commencing on the effective date of this Agreement, Settling Respondents and any of their successors in interest, assigns, lessees and/or sublessees shall refrain from using the Property, or such other Property that is part of the Property, in any manner that would: a) interfere with or affect the efficacy or protectiveness of the remedy selected by EPA and MDE in the FDRTC or b) be inconsistent with the terms of this Agreement. Such restrictions include, but are not limited to, any activity at the Property which would disturb the efficacy and function of the Remedial Components and/or the Monitoring Program and/or increase the risk to human health or the environment from conditions at the Property.
22. Within thirty (30) days following the effective date of this Agreement or the date of acquisition of the Property, whichever date is later, Settling Respondents shall submit to EPA and MDE for review and approval a notice to be filed with the Baltimore City Land Records Office, Courthouse West, Rooms 142 & 610, 100 North Calvert Street, Baltimore, Maryland, which shall provide notice to all successors-in-title that in September 1989, Allied-Signal agreed pursuant to a Consent Decree, Civil Action Number R-89-1804 to implement the remedy selected by EPA and MDE; that on April 16, 1992, EPA and MDE selected a remedy



for the Property; and that Settling Respondents have entered into this Agreement requiring compliance with Section IV (Work To Be Performed), Section V (Access / Conveyance of Property / Notice to Successors In Interest), Section VI (Due Care/Cooperation), and Section XVI (Document Retention) of the Agreement. Such notice(s) shall identify the names and addresses of the Parties to this Agreement, the Docket Number of this Agreement, and the date this Agreement became effective. Such notice(s) shall also recite Settling Respondents' specific obligations to provide access to and restrict use of the Property pursuant to this Agreement. Settling Respondents shall not modify or remove such notice(s) without prior written approval of EPA and MDE. Settling Respondents shall record such notice(s) within ten (10) days of EPA and MDE's approval of such notice(s). Settling Respondents shall provide EPA and MDE with a certified copy of the recorded notice(s) within ten (10) days of recording such notice(s).

23. Settling Respondents shall ensure that assignees, successors in interest, lessees, and sublessees of the Property shall provide the same access and cooperation as provided for in paragraphs 20 and 21, above. Settling Respondents shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the Property as of the effective date of this Agreement and shall ensure that any subsequent leases, subleases, assignments or transfers of the Property or an interest in the Property are consistent with this Section, Section XIII (Parties Bound/Transfer of Covenant) and Section IV (Work To Be Performed) of the Agreement.

## **VI. DUE CARE / COOPERATION**

24. Settling Respondents shall exercise due care at the Property with respect to the Existing

Contamination and any ongoing or future response, cleanup or corrective actions at the Property and shall comply with all applicable local, State, and federal laws and regulations. Settling Respondents recognize that the implementation of any ongoing or response, cleanup or corrective actions at the Property may interfere with Settling Respondents' use of the Property, and may require closure of their operations or a part thereof. Settling Respondents agree to cooperate fully with EPA and MDE, their authorized officers, employees, representatives, or any party performing work under an administrative order or judicial consent decree implementing any ongoing or future response, cleanup or corrective actions at the Property and further agree not to interfere with such response, cleanup or corrective actions. In the event Settling Respondents become aware of any action or occurrence which may present an immediate threat to public health or welfare or the environment, Settling Respondents shall immediately take all appropriate action to prevent, abate, or minimize such action or occurrence, and shall immediately notify EPA, MDE and Honeywell of such action or occurrence. In the event Settling Respondents become aware of a release or threatened release of solid waste, hazardous waste, hazardous constituent, hazardous substance, pollutant or contaminant at or from the Property that constitutes an emergency situation, Settling Respondents shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. §9603, or any other law, immediately notify EPA, MDE and Honeywell of such release or threatened release.

25. Settling Respondents shall ensure that any activity which they undertake, direct or consent to do at the Property shall be consistent with and not interfere with the remedy selected by EPA and MDE in the 1992 FDRTC and the amendments thereto and any corrective action and/or

any cleanup action at the Property, including, but not limited to, any activity required by EPA and/or MDE which relates to Existing Contamination.

## **VII. CERTIFICATION**

26. By entering into this Agreement, Settling Respondents certify that to the best of their knowledge and belief they have fully and accurately disclosed to EPA and MDE all information known to Settling Respondents and all information in the possession or control of their officers, directors, employees, contractors and agents which relates in any way to any Existing Contamination or any past or potential future release of solid wastes, hazardous wastes, hazardous substances, pollutants and/or contaminants at or from the Property and to their qualification to perform the requirements of this Agreement. Settling Respondents also certify that to the best of their knowledge and belief they have not caused or contributed to a release or threat of release of solid wastes, hazardous wastes, hazardous substances, pollutants and/or contaminants at the Property. If the United States and/or the State determine that information provided by Settling Respondents is not materially accurate and complete, the Agreement, within the sole discretion of the United States and the State, shall be null and void; and the United States and the State reserve all rights they may have.

## **VIII. FORCE MAJEURE**

27. "Force majeure," for purposes of this Agreement, is defined as any event arising from causes beyond the control of Settling Respondents, of any entity controlled by Settling Respondents, or of any contractor of Settling Respondents, that delays or prevents the performance of the

requirements of this Agreement despite Settling Respondents' best efforts to fulfill the obligation. The requirement that Settling Respondents exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (a) as it is occurring, and (b) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the requirements of this Agreement or increased costs.

28. If any event occurs or has occurred that may delay the performance of the requirements of this Agreement, whether or not caused by a force majeure event, Settling Respondents shall orally notify EPA and MDE's Project Coordinator within forty-eight (48) hours of when Settling Respondents first knew that the event might cause a delay in the performance of any obligation under this Agreement. Within five (5) days thereafter, Settling Respondents shall provide to EPA and MDE a written notification which includes, at a minimum, an explanation and description of the reasons for the delay; the obligation under this Agreement the performance of which may be delayed; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Settling Respondents' rationale for attributing such delay to a force majeure event, if they intend to assert such a claim; and a statement as to whether, in the opinion of Settling Respondents, such event may cause or contribute to an endangerment to public health, welfare or the environment. Settling Respondents shall include with any notice all available documentation supporting their claim that the delay was attributable to force majeure. Failure to comply with the above requirements shall preclude Settling Respondents from asserting any claim of force majeure

for that event. Settling Respondents shall be deemed to know of any circumstance of which any entity controlled by Settling Respondents, or Settling Respondents' contractor(s) knew or should have known.

29. If EPA and MDE agree that the delay or anticipated delay in the performance of an obligation(s) is attributable to a force majeure event, the time for performance of such obligation(s) under this Agreement that are affected by the force majeure event will be extended by EPA and MDE for such time as is necessary to complete such obligation(s) on an expedited basis. An extension of the time for performance of such obligation(s) affected by a force majeure event shall not, of itself, extend the time for performance of any other obligation required pursuant to this Agreement. If EPA or MDE does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA or MDE will notify Settling Respondents in writing of its decision. If EPA and MDE agree that the delay is attributable to a force majeure event, EPA and MDE will notify Settling Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.
30. If Settling Respondents elect to invoke the dispute resolution procedures set forth in Section IX (Dispute Resolution), they shall do so no later than fifteen (15) days after receipt of EPA and MDE's notice. In any such proceeding, Settling Respondents shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that they complied with the requirements of Paragraphs 27 and 28 of this Section, above. If Settling Respondents carry this burden, the

delay at issue shall be deemed not to be a violation by Settling Respondents of the affected obligation of this Agreement identified to EPA and MDE.

## **IX. DISPUTE RESOLUTION**

31. Unless otherwise expressly provided for in this Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes between EPA, MDE and Settling Respondents arising under or with respect to Settling Respondents' obligations under this Agreement. However, the procedures set forth in this Section shall not apply to actions by the United States or the State to enforce obligations of Settling Respondents that have not been disputed in accordance with this Section IX.
32. Any dispute which arises under or with respect to this Agreement shall in the first instance be the subject of informal negotiations. The period for informal negotiations shall not exceed thirty (30) days from the time the dispute arises, unless it is extended by written agreement of the Parties. The dispute shall be considered to have arisen when Settling Respondents send EPA and MDE a written Notice of Dispute. Any agreement relating to a Notice of Dispute which is reached as a result of informal negotiations shall be in writing and signed by EPA, MDE and Settling Respondents.
33. In the event that a Notice of Dispute relates to EPA and/or MDE's disapproval or modification of a submission, any such Notice of Dispute shall be submitted to EPA and MDE by Settling Respondents within fourteen (14) days of receipt of EPA and/or MDE's disapproval or modification of such submission, and shall set forth the specific point(s) of

dispute and the position which Settling Respondents assert should be adopted as consistent with the requirements of this Agreement.

34. In the event that the Parties cannot resolve a dispute by informal negotiations, EPA and/or MDE shall provide Settling Respondents a written decision on the dispute. Thereafter, EPA and/or MDE may pursue whatever remedies it may have under law, including the right to seek judicial enforcement of this Agreement.
35. The existence of a dispute, as defined in this Section, and EPA and/or MDE's consideration of matters placed into dispute shall not excuse, toll or suspend any other compliance obligation or deadline required pursuant to this Agreement during the pendency of the dispute resolution process.
36. Notwithstanding any other provision of this Agreement, any action or decision by EPA and/or MDE pursuant to this Agreement shall not constitute final agency action giving rise to any rights to judicial review prior to EPA and/or MDE's initiation of judicial action to compel Settling Respondents' compliance with this Agreement.

#### **X. STIPULATED PENALTIES**

37. Settling Respondents shall be liable to EPA for stipulated penalties in the amounts set forth in this Section with respect to its failure to comply with the requirements of this Agreement, unless excused under Section VIII (Force Majeure). "Compliance" by Settling Respondents shall include completion of the activities under this Agreement or any work plan or other plan approved under this Agreement identified below in accordance with all applicable requirements of law, this Agreement, and any plans or other documents approved by EPA pursuant to this Agreement and within the specified time schedules established by and

approved under this Agreement.

38. The following stipulated penalties shall accrue per violation per day for any noncompliance with any requirement of this Agreement:

<i>Penalty Per Violation Per Day</i>	<i>Period of Noncompliance</i>
<i>\$1,000.00</i>	<i>1<sup>st</sup> through 14<sup>th</sup> day</i>
<i>\$2,000.00</i>	<i>15<sup>th</sup> through 30<sup>th</sup> day</i>
<i>\$5,000.00</i>	<i>31<sup>st</sup> day and beyond</i>

39. In the event that EPA assumes performance of a portion or all of the requirements of this Agreement, Settling Respondents shall be liable for a stipulated penalty in the amount of \$1,000 for each day EPA performs such work. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.
40. Following EPA's determination that Settling Respondents have failed to comply with a requirement of this Agreement, EPA may give Settling Respondents written notification of the same and describe the noncompliance. EPA may send Settling Respondents a written notice demanding payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Settling Respondents of such non-compliance.
41. All penalties accruing under this Section X (Stipulated Penalties) shall be due and payable to EPA within thirty (30) days of Settling Respondents' receipt from EPA of a written demand for payment of the penalties, unless Settling Respondents invokes the Dispute Resolution



procedures under Section IX (Dispute Resolution). All payments to EPA under this Section shall be (a) paid by certified or cashier's check(s) made payable to "Treasurer, United States of America," (b) indicate that the payment is for stipulated penalties, (b) reference EPA Region III, the Site, the Docket Number of this Agreement (# ), the name and address of the party making payment and (d) be mailed to:

U.S. EPA, Region III  
P. O. Box 360515  
Pittsburgh, PA 15251-6515.

Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XIX (Notices and Submissions) of this Agreement, and to the Docket Clerk (3RC00), United States Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103-2029.

42. The payment of penalties shall not alter in any way Settling Respondents' obligation to complete the performance of the requirements under this Agreement.
43. If Settling Respondents fail to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as interest. Settling Respondents shall pay interest on its unpaid balance, which shall begin to accrue on the date of demand.
44. Nothing in this Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Settling Respondents' violation of this Agreement.
45. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Agreement.

## **XI. UNITED STATES' AND STATE'S COVENANT NOT TO SUE**

46. Subject to Section XII (Reservations of Rights) and Section XXIV (Public Comment, Opportunity For Public Meeting and Related Subsequent Modifications) of this Agreement and contingent upon satisfactory compliance with the requirements of this Agreement, the United States and the State covenant not to sue or take any other civil or administrative action against Settling Respondents for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a); Sections 3008(h) or 7003 of RCRA, 42 U.S.C. §§ 6928(h) or 6973 or Title 7, Subtitle 2 of the Environment Article of the Annotated Code of Maryland with respect to the Existing Contamination.

## **XII. RESERVATION OF RIGHTS**

47. The covenant not to sue set forth in Section XI (United States' and the State's Covenant Not To Sue), above, does not pertain to any matters other than those expressly specified in Section XI (United States' and the State's Covenant Not To Sue). The United States and the State reserve, and this Agreement is without prejudice to, all rights against Settling Respondents with respect to all other matters, including, but not limited to, the following:
- a. claims based on a failure by Settling Respondents to meet any requirement of this Agreement, including, but not limited to Section IV (Work To Be Performed), Section V (Access/Conveyance of Property/Notice To Successors In Interest), Section VI (Due Care/Cooperation) and Section XVII (Payment of Costs);
  - b. any liability resulting from past or future releases of hazardous wastes, hazardous

constituents, hazardous substances, pollutants, contaminants or solid waste, at or from the Property to the extent caused, or contributed to, by Settling Respondents, their successors, assignees, lessees or sublessees;

- c. any liability resulting from the contribution by Settling Respondents, their successors, assignees, lessees or sublessees to the handling, storage, treatment, transportation or disposal of any solid or hazardous waste that may present an imminent and substantial endangerment;
- d. any liability resulting from exacerbation by Settling Respondents, their successors, assignees, lessees or sublessees of Existing Contamination;
- e. any liability resulting from the release or threat of release of hazardous wastes, hazardous constituents, hazardous substances, pollutants or contaminants, at the Property after the effective date of this Agreement, not within the definition of Existing Contamination;
- f. any liability resulting from contribution by Settling Respondents, their successors, assignees, lessees or sublessees to the handling, storage, treatment, transportation or disposal of any solid or hazardous waste after the effective date of this Agreement, not within the definition of Existing Contamination, that may present an imminent and substantial endangerment;
- g. criminal liability;
- h. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by federal or State agencies other than EPA and MDE that do not arise out of or relate to the Existing Contamination; and
- i. liability for violations of local, State or federal law or regulations.

48. With respect to any claim or cause of action asserted by EPA or MDE, Settling Respondents shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.
49. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which EPA or MDE may have against any person, firm, corporation or other entity not a party to this Agreement.
50. Nothing in this Agreement is intended to limit the right of EPA or MDE to undertake future response or corrective actions at the Property or to seek to compel persons or entities other than Settling Respondents to perform or pay for response, cleanup or corrective actions at the Property. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response, cleanup or corrective actions which may be taken or be required by EPA or MDE in exercising their authority under federal or state law. Settling Respondents acknowledge that they are leasing a Property where response, cleanup and/or corrective actions have been and/or may be required.

### **XIII. SETTLING RESPONDENTS' COVENANT NOT TO SUE**

51. In consideration of the United States' and the State's Covenant Not To Sue in Section XI of this Agreement, Settling Respondents hereby covenant not to sue and not to assert any claims or causes of action against the United States or the State, their authorized officers, employees, or representatives with respect to the Property or this Agreement, including, but not limited to
- 1) any direct or indirect claims for reimbursement from the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA

Sections 106(b)(2), 111, 112, 113; Title 7, Subtitle 2 of the Environment Article of the Annotated Code of Maryland; or any other provision of law; 2) any claim against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Property; or 3) any claims arising out of response activities or corrective actions at the Property, including claims based on EPA or MDE's inspection or oversight of such activities or approval of plans for such activities.

52. Settling Respondents reserve, and this Agreement is without prejudice to, any rights they may have to file actions against the United States based on negligent actions taken directly by the United States, not including inspection or oversight or approval of Settling Respondents' plans or activities, that are brought pursuant to any statute other than CERCLA and/or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA and/or RCRA. Nothing herein shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).
53. This Agreement in no way modifies, or otherwise changes Honeywell's obligations under the Consent Decree, Civil Action Number R-89-1804, or any obligations Settling Respondents may be assigned or assume under that Decree.

#### **XIV. PARTIES BOUND / TRANSFER OF COVENANT**

54. This Agreement applies to and is binding upon the United States and the State and shall apply to and be binding upon Settling Respondents and their officers, directors and employees. The United States' and the State's Covenant Not to Sue in Section XI and Contribution Protection in Section XXII shall apply to the officers, directors, or employees of SBER Harbor Point, LLC and/or Harbor Point Development, LLC, to the extent that the alleged liability of such

officer, director, or employee is based on its status and in its capacity as an officer, director, or employee of SBER Harbor Point, LLC and Harbor Point Development, LLC, and not to the extent that the alleged liability arose independently of the alleged liability of SBER Harbor Point, LLC and/or Harbor Point Development, LLC. Each signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

55. Notwithstanding any other provisions of this Agreement, all of the rights, benefits and obligations conferred upon Settling Respondents under this Agreement may be assigned or transferred to any person with the prior written consent of EPA and MDE in their sole discretion.
56. In the event of an assignment, transfer, lease or sublease of the Property or an assignment or transfer of an interest in the Property, the assignor, transferor, lessor or sublessor shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement except as EPA, MDE and the assignor or transferor agree otherwise and modify this Agreement, in writing, accordingly. Moreover, prior to or simultaneous with any assignment or transfer of the Property, the assignee or transferee must consent in writing to be bound by the terms of this Agreement including but not limited to the certification requirement in Section VII of this Agreement in order for the Covenant Not to Sue in Section XI to be available to that party. The Covenant Not To Sue in Section XI shall not be effective with respect to any assignees, transferees, lessees or sublessees who fail to provide such written consent to EPA and MDE.
57. To request a transfer or assignment of the rights, benefits and obligations under this Agreement, any party making such a request shall submit to EPA and MDE for review and

approval a Certification of Compliance With Agreement and Covenant Not to Sue in the form set forth in Exhibit 3. Upon approval, the Certification of Compliance With Agreement and Covenant Not to Sue shall be deemed to be incorporated into this Agreement and made an enforceable part hereof.

#### **XV. DISCLAIMER**

58. This Agreement in no way constitutes a finding by EPA or MDE as to the risks to human health and the environment which may be posed by contamination at the Property nor does it constitute any representation by EPA or MDE that the Property is fit for any particular purpose.

#### **XVI. DOCUMENT RETENTION**

59. Settling Respondents agree to retain and make available to EPA and MDE all business and operating records, contracts, Property studies and investigations, and documents relating to operations at the Property, for at least ten years, following the effective date of this Agreement unless otherwise agreed to in writing by the Parties. At the end of ten years, Settling Respondents shall notify EPA and MDE of the location of such documents and shall provide EPA and MDE with an opportunity to copy any documents at the expense of EPA or MDE.

#### **XVII. PAYMENT OF COSTS**

60. If Settling Respondents fail to comply with the terms of this Agreement, including, but not limited to, the provisions of Section IV (Work To Be Performed) of this Agreement, they shall

be liable for all litigation and other enforcement costs incurred by the United States and the State to enforce this Agreement or otherwise obtain compliance.

### **XVIII. PROJECT COORDINATORS**

61. The EPA Project Coordinators for this Property is:

Mr. Russell Fish (3WC23)  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia, PA 19103-2029  
(215) 814-3226 (telephone)  
(215) 814-3113 (telefax)

62. The MDE Project Coordinator for this Property is:

Mr. Jim Leizear  
Maryland Department of the Environment  
1800 Washington Blvd  
Baltimore, MD 21230  
(410) 537- 3369 (telephone)



63. The Settling Respondents Project Coordinator is:

Ms. Tonja Bush  
SBER Harbor Point, LLC  
1040 Hull Street  
Baltimore, Maryland 21230  
(443) 573-4362 (telephone)  
(443) 573-4402 (telefax)

64. EPA and MDE may designate other representatives, including, but not limited to, EPA and MDE employees, and federal or state contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Agreement.

65. Settling Respondents' legal counsel shall not serve as their Project Coordinator. Instead, Settling Respondents' Project Coordinator shall be an individual employed by the Settling Respondents who has a technical background in environmental science and engineering.

66. The Settling Respondents shall notify EPA and MDE in writing ten (10) calendar days prior to the change of Settling Respondents' Project Coordinator.

#### **XIX. NOTICES AND SUBMISSIONS**

67. Whenever under the terms of this Agreement written notice is required to be given by one Party to another, it shall be directed to the individuals or office at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Agreement with respect to the United States, EPA, the State, MDE, SBER Harbor Point, LLC and Harbor Point Development, LLC, respectively.

As to the United States:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20044  
Re: DOJ # 90-7-1-07125

and

Sheila Briggs-Steuteville  
Senior Assistant Regional Counsel (3RC43)  
United States Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

As to EPA:

Russell Fish  
EPA Project Coordinator (3WC23)  
United States Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

As to the State:

Frank R. Levi  
Assistant Attorney General  
Office of the Attorney General  
Maryland Department of the Environment  
1800 Washington Blvd., Suite 6048  
Baltimore, MD 21230

As to MDE:

Harold L. Dye, Jr.  
Program Administrator  
Hazardous Waste Program

Waste Management Administration  
Maryland Department of the Environment  
1800 Washington Blvd  
Baltimore, MD 21230

*As to Settling Respondents:*

Deborah E. Jennings, Esq.  
Piper Rudnick LLP  
111 South Calvert Street, Suite 1950  
Baltimore, Maryland 21202-6174

and

Carl W. Struever  
SBER Harbor Point, LLC  
1040 Hull Street  
Baltimore, Maryland 21230

*As to Honeywell:*

Christopher French  
Project Manager  
Honeywell International Inc.  
P.O. Box 1139  
101 Columbia Road  
Morristown, NJ 07962

68. All other written documents required under the terms of this Agreement to be sent by one Party to another shall be directed to the respective Project Coordinator identified pursuant to Section IV (Work To Be Performed) of this Agreement.

**XX. EFFECTIVE DATE**

69. The effective date of this Agreement shall be the date on which EPA issues written notice to SBER Harbor Point, LLC and Harbor Point Development LLC that EPA and MDE have fully

executed the Agreement after the fifteen (15)-day period as provided in Section XXIV (PUBLIC COMMENT AND RELATED SUBSEQUENT MODIFICATIONS).

## **XXI. TERMINATION**

70. If any Party believes that any or all of the obligations under Section V (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, that Party may request in writing that the other Party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the party requesting such termination receives written agreement from the other party to terminate such provision(s).

## **XXII. CONTRIBUTION PROTECTION**

71. With regard to claims for contribution against Settling Respondents, the Parties hereto agree that the Settling Respondents are entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) and Md. Code Ann., Envir. § 7-221 (1996 and 2002 Supp.), for matters addressed in this Agreement. With the exception of any matters described in Section XII (Reservation of Rights), above, the matters addressed in this Agreement are all response, cleanup or corrective actions taken or to be taken and response, cleanup or corrective costs incurred or to be incurred by the United States, the State or any other person for the Property with respect to the Existing Contamination.
72. Settling Respondents agree that with respect to any suit or claim for contribution brought by them for matters related to this Agreement they will notify the United States and the State in

writing no later than sixty (60) days prior to the initiation of such suit or claim.

73. Settling Respondents also agree that with respect to any suit or claim for contribution brought against them for matters related to this Agreement they will notify in writing the United States and the State within ten (10) days of service of the complaint on them.

### **XXIII. EXHIBITS**

74. Exhibit 1 shall mean the map depicting the Property.
75. Exhibit 2 shall mean the Consent Decree, Civil Action Number R-89-1804 executed by EPA, the MDE and Allied-Signal in September 1989.
76. Exhibit 3 shall mean the Certification of Compliance with Agreement and Covenant Not to Sue.

### **XXIV. PUBLIC COMMENT, OPPORTUNITY FOR PUBLIC MEETING AND RELATED SUBSEQUENT MODIFICATIONS**

77. Through published notice, EPA and MDE shall announce the availability of this Agreement to the public for review and comment and opportunity for public meeting, if requested . EPA and MDE shall accept comments from the public for a period of fifteen (15) calendar days after such announcement. If requested, a public meeting will be held. At the end of the comment period, EPA and MDE shall review all comments received during the above defined fifteen (15)-day period and/or at such public meeting and shall:
- a. determine that the Agreement should be made effective in its present form, in which case EPA and MDE shall notify Settling Respondents in writing and send them a copy of this

Agreement executed by the Parties;

- b. withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate; or
- c. determine that modification of the Agreement is necessary, in which case EPA and MDE shall notify Settling Respondents in writing as to the nature of all required changes. If the Parties agree in writing to such modifications, the Agreement shall be so modified.

78. In the event that, following its review of all comments received during the above defined fifteen (15) day period, EPA and MDE determine that modification of the Agreement is necessary and the Parties are unable to agree on modifications required by EPA and MDE as a result of public comments, this Agreement shall be withdrawn by EPA and MDE.

**XXV. COUNTERPART ORIGINALS**

79. This document may be executed by the Parties by signing counterpart originals.

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY:

\_\_\_\_\_  
Sheila Briggs-Steuteville  
Sr. Assistant Regional Counsel  
EPA, Region III

\_\_\_\_\_  
Date

BY:

\_\_\_\_\_  
William C. Early  
Regional Counsel  
EPA, Region III

\_\_\_\_\_  
Date

BY:

\_\_\_\_\_  
Donald S. Welsh  
Regional Administrator  
EPA, Region III

\_\_\_\_\_  
Date

BY:

\_\_\_\_\_  
John P. Suarez  
Assistant Administrator for  
Enforcement and Compliance Assurance  
IT IS SO AGREED:

\_\_\_\_\_  
Date

UNITED STATES DEPARTMENT OF JUSTICE

BY:

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Thomas L. Sansonetti  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice

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Date

BY:

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Elliot Rockler, Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice

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Date



IT IS SO AGREED:

MARYLAND DEPARTMENT OF THE ENVIRONMENT

BY:

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Richard W. Collins, Director  
Waste Management Administration  
Maryland Department of the Environment

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Date

APPROVED AS TO LEGAL SUFFICIENCY:

STATE OF MARYLAND

BY:

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Frank R. Levi, Assistant Attorney General  
Office of the Attorney General  
Maryland Department of the Environment

---

Date

IT IS SO AGREED:

SETTLING RESPONDENTS

BY:

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Carl W. Struever  
SBER Harbor Point, LLC

---

Date

BY:

---

George Philippou, Esquire  
Harbor Point Development, LLC

---

Date